No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES, PETITIONER

v.

LOUIS TOWNSLEY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Claims (R. 14–29) have not yet been officially reported.

JURISDICTION

The original findings of fact and conclusions of law of the Court of Claims were entered on October 4, 1943 (R. 3). On March 6, 1944, the court overruled the Government's motion for a new trial, vacated its order of October 4, 1943, and entered new findings of fact and conclusions of law (R. 4–14, 29). The petition for a writ of certiorari was filed on June 6, 1944, and was granted on October 9, 1944. The jurisdiction of this Court

rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

The principal question is whether Section 23 of the Independent Offices Appropriation Act, 1935, in so far as it provides for overtime compensation for services in excess of 40 hours per week, applies to Government employees of the Canal Zone whose compensation is fixed on a monthly basis. If this question is answered in the affirmative, the further question presented is whether the Court of Claims employed the proper method for computing such overtime compensation.

STATUTES INVOLVED

Section 23 of the Independent Offices Appropriation Act, 1935, approved March 28, 1934 (c. 102, 48 Stat. 522, 5 U. S. C. 673c), provides:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not

be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.

Section 6 of the Act of June 30, 1906 (c. 3914, 34 Stat. 763, 5 U. S. C. 84), provides:

> Hereafter, where the compensation of any person in the service of the United States is annual or monthly the following rules for division of time and computation of pay for services rendered are hereby established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one thirtieth of one of such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. Any person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the thirtieth day of said

month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry: *Provided*, That for one day's unauthorized absence on the thirty-first day of any calendar month one day's pay shall be forfeited.

STATEMENT

On March 14, 1940, the respondent, a former employee of the Panama Canal (an instrumentality of the United States), brought suit in the Court of Claims, claiming that he was entitled, by virtue of Section 23 of the Act of March 28, 1934, *supra*, to compensation at the rate of "time and one-half" for all hours of service in excess of 40 hours per week rendered by him as an employee of the Panama Canal during the period from March 28, 1934, to August 31, 1939. The undisputed facts, as found by the Court of Claims, are as follows:

Between March 28, 1934 and August 31, 1939, the respondent was successively employed as operator, chief operator, and master of the pipeline dredge *Las Cruces* which was operated by the Panama Canal (R. 5). He was paid on a monthly basis at rates which had been fixed by the Governor of the Canal Zone, on recommenda-

tion of a wage board (R. 5–6),[1] for the various positions held by him (R. 66–67).[2]

During this period the dredge *Las Cruces* was engaged in maintaining channels and terminal harbors in the Canal Zone, and regularly operated on a schedule of 24 hours each day, except Sunday, divided into three eight-hour shifts (R. 6). There was occasional Sunday operation of the dredge for

[1] The Act of August 24, 1912 (c. 390, § 4, 37 Stat. 561, 48 U. S. C. 1305) provided that "persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed" and their compensation fixed "by the President, or by his authority, until such time as Congress may by law regulate the same, but the salaries or compensation fixed * * * shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States." Executive orders fixed the general conditions of employment and delegated all but certain judiciary appointments to the Governor of the Canal Zone. Executive Order No. 1888 of February 2, 1914, as amended by Executive Order No. 2514 of January 15, 1917 (R. 36–46). On April 9, 1919, the Governor created an advisory board (known as the "Board on Rates of Pay—Gold Roll") to advise him on wages for positions filled by employees who were members of the American Federation of Labor (R. 8–9). On March 1, 1928, this Board was changed to a two-man "Wage Board," one appointed by the Governor and one nominated by the Panama Metal Trades Council (A. F. of L.) and approved by the Governor (R. 9–10).

[2] From March 28, 1934, to January 6, 1937, the respondent's monthly compensation as operator was $306. From January 7, 1937, to November 30, 1937, his monthly compensation as chief operator was $311. For the remainder of the claim period, his monthly compensation as master was $336. (R. 5–6.)

the completion of important work or for repairs and replacements, and on such occasions the master arranged for the required force of men and was usually present as supervisor (R. 6). During the term of his successive employment as operator, chief operator, and master, the respondent's normal work week was composed of six eight-hour days, a total of 48 hours per week (R. 6–8). As operator, the respondent was in charge of and responsible for all equipment on the dredge when the master and chief operator were not aboard (R. 8). As chief operator, he was required to stand the regular eight-hour watch as operator, and was acting master during the absence of the master for about two months each year (R. 7). As master, he was subject to call at all times in the event of a major breakdown or other unusual occurrence, and was ordinarily free to leave his work during the day for personal reasons (R. 6–7).

For required overtime work during the claim period, in excess of his regular 48-hour workweek, the respondent was entitled to compensatory time-off in accordance with personnel regulations issued by the Governor (R. 6–7).[3] Neither the respondent nor any other employee of the Canal similarly employed ever made any formal request, after the enactment of the Act of March 28, 1934, to be placed on a 40-hour week schedule or to be

[3] Such compensatory time-off was available only to employees of the Canal Zone paid on a monthly basis (R. 7, 79–80).

paid overtime for services in excess of 40 hours per week (R. 13), even though a well established procedure, with which the respondent was familiar (R. 58), was available for the presentation of rate matters and rate claims to the Wage Board (R. 9, 47, 49, 50–54).[4] Immediately before his retirement, on August 29, 1939, the respondent wrote the Executive Secretary of the Panama Canal that he believed he should have been placed on a 40-hour week, and that he proposed to bring suit in the Court of Claims for overtime compensation for services in excess thereof (R. 13).

Inasmuch as the respondent was employed and paid on a monthly basis during the entire claim period, the official records of the Canal did not disclose the hours he actually worked. From data furnished by the timekeeper of the *Las Cruces*, however, the court below made the following computation of the number of days of eight hours each which the respondent had worked in excess of 40 hours a week (R. 13–14):

Period	Position	Monthly Salary	Days
March 28, 1934, to January 6, 1937	Operator	$306	105½
January 7, 1937, to November 30, 1937	Chief Operator	311	45
December 1, 1937, to August 31, 1939	Master	336	84

[4] While the Court of Claims failed to make any specific finding in this respect, it is undisputed that neither the respondent nor any other monthly employee employed by the Panama Canal was paid overtime. Shortly after passage of the Act of March 28, 1934, the Comptroller General issued several rulings to the effect that such employees

The court below held that for such overtime services the respondent was entitled to compensation at the rate of "time and one-half" under Section 23 of the 1934 Act (R. 14). To compute the salary basis upon which the overtime pay should be determined, the court reduced the respondent's monthly salary to a daily basis by multiplying the monthly rate by 12, dividing the product by 52 to give the weekly salary, and then dividing that quotient by 5 to obtain the daily rate of $14.12, $14.35, and $15.51 a day, respectively, for his three separate positions during the claim period (thus computing the salary on the basis of a 5-day, 40-hour week). Combining these calculations, the court found that there was due to the respondent as overtime pay the sum of $5,157.57, for which it entered judgment in his favor. (R. 13–14.) Judge Whitaker dissented on the ground that Section 23 was not to be construed as applicable to employees whose salary was fixed and paid on a monthly basis (R. 27–29).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that Section 23 of the 1934 Act was applicable to employees paid on a monthly basis.

2. In holding that the respondent was entitled to overtime compensation under Section 23 of the

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were not entitled to overtime under that Act. 13 Comp. Gen. 265, 269, 270; 13 *id.* 280; 14 *id.* 156, 164. The Comptroller General also ruled that Section 23 was not applicable in any respect to employees of the Panama Canal "on floating

1934 Act for services rendered in excess of 40 hours per week.

3. In determining the daily rate of pay, for the purpose of computing overtime compensation, by dividing the annual salary by 52 and then dividing the quotient by 5, instead of dividing the monthly rate of pay by 30.

4. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

The language of Section 23 of the Act of March 28, 1934, its legislative history, the consistent administrative construction placed upon it, and its relation to other legislation dealing with the problem of overtime compensation for Government employees, show that the provision was intended to apply only to employees paid upon an hourly or per diem basis, and that the Court of Claims erred in construing the statute to extend to annual or monthly employees.

I

Section 23 requires that "the weekly compensation * * * for the several trades and occupations, which is set by wage boards or other wage-fixing authorities" shall be established at rates to equal "the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932." This provision can readily be ap-

equipment" because their wages were not fixed through wage board procedure. 14 Comp. Gen. 156, 158. For other similar rulings see 13 *id.* 486; 14 *id.* 552.

plied to employees whose wages are fixed on a weekly or per diem basis, since their "weekly compensation" and "weekly earnings" can be computed merely by adding the number of hours or days in the workweek. But serious difficulties arise if Section 23 is sought to be applied to an employee paid on a monthly or annual basis, as it was by the court below. Moreover, the Act of June 30, 1906, prescribing the only statutory formula for estimating the daily pay of monthly and annual employees, does not furnish any guide for reducing such compensation to a weekly rate, and the Comptroller General has consistently ruled that monthly compensation may not be calculated on a weekly basis.

The legislative history of Section 23 reveals a Congressional intention that it should apply to per diem and hourly workers only. Section 23 was intended to remove an inequality between monthly and annual employees, on the one hand, and per diem and hourly employees, on the other. All Government employees had suffered general salary reductions during the depression, and in legislation terminating with the 1934 statute such reductions were gradually eliminated. But because the length of the work week had been somewhat curtailed, per diem and hourly employees received a lesser net wage than they had prior to the reductions, whereas monthly and annual employees had their original earnings restored, since their salaries remained constant regardless of the number of hours worked per week. This

disparity was brought to the attention of Congress by a representative of the American Federation of Labor who submitted a statement on behalf of "the 75,000 or more per diem mechanics and workmen employed at the navy yards, arsenals, the Panama Canal Zone, and numerous other divisions of the federal service, whose wages are set by wage boards or similar wage fixing authorities;" and he proposed a provision which became Section 23 of the Act of March 28, 1934. The relevant legislative materials show that this provision was intended to apply only to employees paid on an hourly or daily basis.

The meaning of Section 23 of the 1934 Act may properly be derived not only from the proceedings in Congress prior to its enactment, but also from the subsequent legislation dealing with the same subject matter. A series of later enactments dealing with overtime compensation for Government employees, and the legislative materials relating to these enactments, show a distinct understanding by Congress that Section 23 of the 1934 Act did not apply to monthly and annual employees whose salary was fixed by wage boards. For example, the Act of June 28, 1940, provided overtime compensation for certain groups of classified and unclassified employees, and the committee reports on the bill noted that this was the first instance of overtime compensation to monthly and annual employees.

Prior to the 1934 Act, the Government consistently treated monthly and annual employees differently from per diem and hourly employees in so far as overtime compensation was concerned; only the latter class received compensation for additional work. Despite the broad powers vested in several Government agencies employing a wage board procedure to fix the compensation of their unclassified employees, overtime compensation was never provided for or paid to monthly or annual employees. This was also true of the Panama Canal. After the 1934 Act, none of these agencies, including the Panama Canal, paid any overtime compensation to monthly or annual employees, either under Section 23 of that Act or otherwise, and it was not until the Act of October 21, 1940, which expressly authorized such payment to monthly employees, that any break occurred in the consistent practice. Such administrative construction of the 1934 Act is entitled to great weight in determining its true meaning.

II

Assuming that Section 23 is applicable to respondent, there was no warrant for the method of computation employed by the court below, consisting of the division of respondent's yearly earnings by 52 to obtain the weekly figure, and division of the weekly figure by 5 to ascertain compensation for an 8-hour day. This formula was inconsistent with the Act of June 30, 1906,

the only statutory provision for dividing the "time and computation of pay for services rendered" by monthly employees. Under that Act, the monthly compensation must be divided by 30 in order to obtain "the daily rate of pay," and this method would result in a considerably lower amount of compensation than was reached by the court below. The formula of the 1906 Act for determining overtime pay for monthly employees is the one employed in the statutes which since 1940 have authorized overtime compensation for monthly employees, and Congress has never authorized a deviation from this basis for determining fractional compensation of monthly employees.

ARGUMENT

SECTION 23 OF THE ACT OF MARCH 28, 1934, IS NOT APPLICABLE TO EMPLOYEES PAID ON A MONTHLY OR ANNUAL BASIS

The Court of Claims held that the respondent came within Section 23 of the Act of March 28, 1934, because his compensation was set by a wage-board or other wage-fixing authority, and hence was entitled to overtime compensation for services in excess of 40 hours per week, even though he was employed and paid on a monthly basis (R. 14). Relying principally upon the broad language of the statute, the court rejected the Government's contention that the Act was intended to apply only to employees paid upon an

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hourly or per diem basis, and not to employees, such as the respondent, whose compensation was fixed upon a monthly or annual basis.

We submit that the construction made by the court below can be supported only if the language of the Act is read out of the context of its history and purposes. The Act is not to be construed in vacuo, as if it were a discrete instance of legislation dealing with overtime compensation for federal employees. The meaning of its elliptical language becomes clear when the statute is viewed in the perspective gained from examination of its background, its legislative history, the consistent administrative construction placed upon it, and its relation to other enactments of Congress dealing with the same subject-matter. These relevant, and indeed indispensable, aids to construction show that Section 23 was not intended to obliterate the distinction, deeply rooted in the system of federal employment and compensation, between treatment of hourly and per diem employees, on the one hand, and annual or monthly employees, on the other.

(A) THE LANGUAGE OF SECTION 23

Even if we look to no more than the language of the statute, the construction placed upon it by the court below presents serious practical difficulties. Title II of the Act of March 28, 1934, amended various "economy" statutes which had reduced the salaries of federal employees. Section 23 required

that the "weekly compensation * * * for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932." The Section also contained a proviso that "the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half."

Since "the general purpose of the section may be taken into account" in construing a proviso (*McDonald* v. *United States*, 279 U. S. 12, 22), the proviso in Section 23 may be regarded as coextensive in scope with that of the body of the Section.[5] The scope of the statute is indicated by the emphasis placed upon "weekly earnings" and by the reference to the "several trades and occupations" whose "weekly compensation" is set by wage boards or other wage-fixing authorities. Federal employees are customarily compensated on the basis of an annual or monthly salary, a daily wage, or an hourly rate. The Government does not employ or pay persons upon a weekly basis, as such. And, apart from the present Act, the term "weekly compensation" has been em-

[5] It was not contended below by the respondent, nor suggested by the Court of Claims, that the proviso was broader than the body of Section 23.

ployed by Congress only in relation to Government employees who are paid by the hour. Cf. Section 101 (a) of the Act of June 30, 1932, 47 Stat. 399; Act of June 26, 1936, 49 Stat. 1969 (5 U. S. C. 673c).

Any other use of the term inevitably gives rise to serious difficulties of computation. Daily or hourly compensation is readily reducible to a weekly rate, since the number of days or hours worked each week can be quickly and precisely determined. But if an employee is paid on an annual or monthly basis, his "weekly compensation" can be determined only hypothetically and inexactly. Neither a year nor a month contains an exact number of weeks,* and to estimate "weekly compensation" for such employees would require the preliminary selection of an arbitrary formula. The court below divided the annual pay by 52 (R. 13–14, 25), but, with equal justification, that figure could have been divided by 365¼ and the quotient multiplied by 7. If this method of computation were employed, a somewhat different result would be reached. Or if a "round figure" formula were adopted, the monthly pay would be divided by 30 and the quotient multiplied by 7 to reach another result different from the others (cf. Act of June 30, 1906, *supra*, pp. 3–4).

Any mode of computation of weekly compensation for annual or monthly employees would not

* Even a 28-day February only occasionally begins with a Monday and ends with a Sunday.

only necessitate the selection of some arbitrary formula, but would also be inconsistent with rulings of the Comptroller General. The Act of June 30, 1906, (*supra,* pp. 3–4), which the 1934 Act neither repealed nor amended, prescribes "rules for division of time and computation of pay for services rendered" by federal employees whose compensation "is annual or monthly", such rules consisting, in general, of the division of a month's pay into 30 daily units. But no method has ever been prescribed for reducing such compensation to a weekly basis, and the Comptroller General has repeatedly held that the compensation of monthly and annual employees is not and cannot be calculated on a weekly basis (12 Comp. Gen. 11, 14; 12 *id.* 204, 206; Opinion B–40532 to the Secretary of War, March 18, 1944).[7]

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[7] In the opinion of March 18, 1944, the Comptroller General stated:

"To determine the daily rate of a per annum salary of War Department employees there is no authority under existing law to divide the annual salary on any basis other than that specifically provided by the act of June 30, 1906, 34 Stat. 763 (5 U. S. Code 84), that is, into 12 equal installments, one of which shall be the pay for each calendar month, each of the 12 installments (or monthly compensation) to be divided by 30 to determine the daily rate, or a division of the annual rate by 360 to determine the daily rate. There is no authority of law to compute and to make payments for any fractional part of each calendar month of the year regardless of the number of days therein—whether such payments be made weekly or biweekly—on any basis other than that specifically prescribed by said statute. Hence, the annual rate may not be divided into 52

None of these difficulties occurs if Section 23 is limited to per diem or hourly employees. The "weekly compensation" of such employees is the product of the basic rate multiplied by the number of hours or days of work per week, both readily adjusted under the provisions of the Section to yield a result equivalent to the total weekly earnings under the wage schedule in effect on June 1, 1932. The basic rate thus determined could then be employed for the calculation of overtime compensation for such employees, in accordance with the uniform practice which, as we shall show, was also in effect on June 1, 1932.

Moreover, Section 23 of the 1934 Act in terms applies only to employees in the "several trades and occupations" whose compensation is fixed by

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equal installments. Neither may adjustments be made at the end of the year, nor may the annual salary be divided by 365 (or 366) to determine the daily rate. The amount of each week's compensation depends upon the number of calendar days (of the year) in the week for which a day's compensation ($\frac{1}{366}$) of the annual rate is payable, the thirtieth and thirty-first of a 31-day month to be regarded as one day, February 28, in other than leap years, to be regarded as 3 days, and February 29, in leap years, to be regarded as 2 days. For instance the pay for the week ending Saturday, March 4, 1944 (containing February 29) would differ from the pay for the week ending March 11, 1944. Likewise, the pay for the week ending Saturday April 1, 1944 (including March 31) would differ from the pay for the week ending April 8, 1944, as the pay for any week which includes the thirty-first day of a month would be less than the pay for any week that does not include the thirty-first day of a month."

a wage board.[8] There has been no judicial definition of this phrase nor, so far as can be discovered, any legislative use other than in Section 23 itself.[9] But the precise phrase occurs in the Navy wage board regulations and the annual schedules of wages issued by the Navy, both of which were in effect when the 1934 Act was passed. The Navy Department wage board procedure is based on the Act of July 16, 1862 (12 Stat. 587, 34 U. S. C. 505), which provides that "hours of labor and the rate of wages of the employees in the navy yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, * * * subject to the approval and revision of the Secretary of the Navy." Pursuant to

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[8] Employees whose compensation is fixed by a wage board are to be distinguished from those whose compensation is fixed pursuant to the Classification Act of 1923, 42 Stat. 1488 (5 U. S. C. 661 *et seq.*). The latter Act originally applied solely to the departmental service (in the District of Columbia) but was extended to the field service by the Welch and Brookhart Acts (45 Stat. 776; 46 Stat. 1003).

[9] Initially, the Comptroller General sought to define "* * * several trades and occupations * * *" as including all employees whose compensation was fixed by wage boards. 13 Comp. Gen. 265, 268. Subsequently, employees of the Alaska Railroad were held not subject to Section 23 on the ground that, although a procedure similar to wage board procedure was employed to establish their wages, railroading was not a "trade or occupation." 14 *id.* 42. Prior to 1934, the phrase, "wage boards or similar authority" appears only in the Act of July 3, 1918, 40 Stat. 757, 814, and in the Act of May 28, 1928, 45 Stat. 776, 785. In neither instance is the phrase defined.

this broad grant of power, schedules of wages have been issued annually for the navy yards pursuant to a detailed formalized procedure. See *Regulations for Boards and Wages of the Navy Department,* Circular letter SONYD–7–Gn, Navy Department, June 15, 1929. And it is significant, we believe, that these schedules set out, for each "trade or occupation" in every navy yard, rates of compensation which are entirely on an hourly or per diem basis. See, e. g., *Schedule of Wages for Civil Employees in the Field Service of the Navy Department and the Marine Corps* Revised to July 23, 1931, pp. 33–38. This schedule was in effect in June 1932, and it was the "wage schedules in effect on June 1, 1932" to which Section 23 refers as the standard for restoration of earnings (see p. 15, *supra*).

Moreover, the direction that "weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, * * * shall be reestablished" clearly indicates that Congress intended to deal with employees whose compensation had actually been reduced by means other than the percentage reduction. As will be shown below, the compensation of annual or monthly employees had not been reduced by any means other than the percentage reduction. Considering the statutory language alone, therefore, we think it a more reasonable construction of Section 23 if it is limited to per diem and hourly workers, than if it is enlarged to include monthly and annual employees, as the court below concluded.

(B) THE LEGISLATIVE HISTORY

The Act of March 28, 1934, marked the end of the series of so-called "Economy Acts," a group of measures designed to decrease Government expenditures through the reduction of compensation and the suspension of privileges of federal employees.

The first Economy Act, approved June 30, 1932 (47 Stat. 382), established a regular schedule for reduction of the salaries of federal employees through a system of furlough or reduction of the workweek.[10] Thus, per diem officers and employees were given a maximum 5-day workweek for which they were to receive 10/11 of the salary payable for a regular 5½-day week (Sec. 101 (a)); and officers or employees paid on an annual basis were furloughed for one month without compensation.[11]

This furlough system was superseded by the Act of March 20, 1933, title II (48 Stat. 13, Sec. 3), which authorized a general percentage reduction up to 15 per cent, applicable to all federal employees, to be determined by periodic executive orders based on a 1928 cost-of-living index. The percentage reduction in the 1933 Act was intended as a complete substitute for the furlough as a

[10] This Act was continued for one year (until June 30, 1934) by the Treasury-Post Office Appropriation Act of March 3, 1933 (47 Stat. 1489), but was superseded March 20, 1933 by a second Economy Act.

[11] The pay reduction furloughs prescribed by Section 101 should be distinguished from the independent power

means of reducing compensation,[12] but it was found that this operated unfairly with respect to per diem employees, who suffered a greater pay reduction than the annual or monthly employees because their workweek had been decreased. This was brought to the attention of Congress at the hearings before the Senate Committee on Appropriations on H. R. 6663, the bill which became the Act of March 28, 1934. N. P. Alifas, representative of the Metal Trades' Department, American Federation of Labor, submitted a statement on behalf of "the 75,000 or more per diem mechanics and workmen employed at the navy yards, arsenals, the Panama Canal Zone, and numerous other divisions of the Federal service, whose wages are set by wage boards or similar wage-fixing authorities," in which he pointed out that while monthly and annual employees had suffered a 15 per cent wage reduction, per diem employees, when their weekly earnings were considered, had sustained a greater wage reduction than 15 per cent.[13] This

to furlough employees without pay to avoid exceeding appropriations or upon a failure of work. Cf. Section 216 of the Act of June 30, 1932, *supra*.

[12] In recommending the passage of H. R. 2820, which became the Act of March 20, 1933, *supra*, the Committee on Economy stated that there was "no possibility of a double reduction in salary, the present act is in lieu of the furlough plan * * *." H. Rept. 1, 73d Cong., 1st Sess., p. 7. The general pay reductions, attaining a maximum of 15 per cent, were gradually reduced until they were completely abolished in 1935.

[13] The full statement is set forth in Appendix A, *infra*, pp. 55–60.

greater wage reduction had been accomplished by the device of laying off per diem employees for one full working day every two weeks, thereby reducing the workweek for such employees to an average of 40 hours, while their basic salary was at the same time being reduced by the general percentage prescribed under the 1933 Act.[14] Mr. Alifas stated that this "furlough had practically become the permanent policy of the Navy Department and results in a permanent reduction of over 22% in the base pay of these employees." He maintained that a restoration of the 15 per cent wage reduction, which was then generally applicable to Government employees, would put monthly and annual employees on the salary base in effect prior to the Economy Acts, since their compensation in no way depended upon their hours of work, and that for the workweek shortened by the furlough they would receive the same salary as for a regular workweek of 44 hours. The per diem employees, on the other hand, would not be made whole by the restoration of the 15 per cent wage reduction unless they could earn for the shortened 40-hour workweek, which was the "permanent policy of the Navy Department," the same sum they previously had received for a 44-hour week. Mr. Alifas also asserted that per diem and hourly employees had been discharged

[14] On a 44-hour workweek basis, the elimination of eight hours every two weeks results in an average 40-hour workweek for such employees.

during the life of the Economy Act of March 20, 1933, due "to lack of work and lack of funds," and that upon being reemployed they were paid at lower rates of pay than they had previously received. To remedy this situation, he proposed the following amendment to H. R. 6663:

> *Provided,* That the rates of compensation for the several trades and occupations, which are set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than the respective wage schedules in effect on June 1, 1932; and that the Navy Department and other departments and independent establishments of the Government are hereby directed to restore to employees any reduction in pay which they have received since June 30, 1932, in addition to the 15 per cent congressional cut, without increasing the present hours of service; and that the respective departments and independent offices are hereby authorized to incur such deficiencies as may be necessary to put this provision into effect. [Appendix A, *infra*, p. 58].

The bill was reported by the Senate Committee on Appropriations, without the amendment suggested by the spokesman for the American Federation of Labor (S. Rep. No. 294, 73d Cong., 2d Sess.). However, to accomplish the purpose of this proposed amendment, Senator Thomas of Oklahoma, on the floor of the Senate, successfully offered an amendment to the bill, identical in wording with

what eventually became Section 23 of the Act of March 28, 1934. Senator Thomas, in offering the amendment, unmistakably indicated that he was acting on behalf of the per diem employees for whom the representative of the American Federation of Labor had appeared before the Senate Subcommittee (78 Cong. Rec. 2977):

> Mr. THOMAS of Oklahoma. Mr. President, this amendment is offered to help the employees in the navy yards, the arsenals, the Panama Canal Zone, the Government Printing Office, and the Bureau of Engraving and Printing. It simply proposes to put them back on the same status they occupied in July of 1932.
>
> * * * * *
>
> Mr. THOMAS of Oklahoma. Mr. President, the amendment adopted this afternoon restores their pay cut, it is true, provided that amendment remains in the law. This amendment proposes to give the employees of these several bureaus an increase in their pay even though they do not have to work an increased number of hours. At the present time they work 40 hours and get 44 hours' pay. Under the amendment it is possible that the board that has control of these employees will let them work 40 hours and they will possibly get 48 hours' pay, ***provided they get an increase of their hourly pay.*** [Italics supplied.]

No reference was made to Senator Thomas's amendment during the further consideration of H. R. 6663 by both Houses of Congress, and the

bill was passed. The President vetoed the Act primarily because of the provisions for veterans' benefits, but his veto message also criticized Section 23 on the ground that it was discriminatory in paying "employees in some departments of the Government 48 hours pay for 40 hours' work" (House Doc. 291, 73d Cong., 2d Sess., p. 2). The Act became law over the President's veto, however, and the debates in Congress with respect to the veto message showed that Congress contemplated that the measure was limited to the per diem employees whose hours of labor, upon which their compensation depended, had been reduced as a "permanent policy" (78 Cong. Rec. 5574):

> Mr. CUTTING. * * *
>
> The President goes on to say in the same connection that—
>
> The bill also contains several discriminatory provisions, such as paying employees in some departments of the Government 48 hours' pay for 40 hours' work.
>
> Mr. President, is not that exactly the same plan which is being proposed to industry at the present time? Is not that in effect what the N. R. A. is trying to do, to pay the same amount of wages for shorter periods of labor? If so, how can we make a discrimination on a matter of principle between what the Government is willing to do itself and what it is urging industry to do?
>
> * * * * * *
>
> Mr. WALSH. Does that refer to the class

> of employees who are working in navy yards, and who have had their hours of labor reduced from 48 to 40?
>
> Mr. CUTTING. I cannot interpret what the President's message means. I can quote his language to the Senator:
>
> * * * * *
>
> Mr. WALSH. The navy-yard employees have been contending that their hours of employment were reduced from 48 to 40, and that their wages were reduced at the same time from the 48-hour wage to the 40-hour wage. I think the reference is to that.

The analogy thus drawn between Section 23 and the N. I. R. A. is significant, since the Court of Claims has held that the N. I. R. A. was not designed to increase the compensation of employees "on a straight salary basis" but only of employees "on an hourly basis." *Steel Products Engineering Co.* v. *United States*, 90 C. Cls. 513, 517. And although the Court of Claims in the present case recognized that Section 23 was the result of the testimony and efforts of N. P. Alifas, the spokesman for the American Federation of Labor (R. 18), it rejected the plain evidence of Congressional purpose disclosed by the legislative history. The court could find nothing "in the text of Section 23" or "in the debates in Congress" which "even suggests the distinction which the Government asks us to draw" (R. 19). As we have shown (*supra*, pp. 14–20), the language of

the statute is not only susceptible of the interpretation that it covers per diem and hourly workers only, but is in fact most easily so read. Even if the language of the statute were less equivocal, the legislative materials would afford relevant aids to construction. *United States* v. *Fisher*, 2 Cranch 358, 386; *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *Dickerson*, 310 U. S. 554; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476. Resort to such aids to construction shows clearly that, in enacting Section 23, Congress was concerned only with those employees who were paid on a per diem or hourly basis.

(C) RELATED LEGISLATION

The federal statutes dealing with the problem of overtime compensation for Government employees, including Section 23 of the 1934 Act, are consistent only with the premise that Congress, prior to 1940, did not intend to grant overtime benefits to Government employees employed and paid on a monthly or annual basis, whether their salaries were fixed by wage boards or under the Classification Act of 1923.[15] Indeed, many provi-

[15] The subsequent legislative materials were presented to the court below by the Government on its motion for new trial, but the court brushed these statutes aside as merely resolving the question of overtime "for the future" (R. 25).

sions of the overtime statutes enacted between 1936 and 1943 are inexplicable if Section 23 of the 1934 Act is regarded as having already provided overtime compensation for monthly and annual employees whose salaries were fixed by a wage board.

(1) The Act of June 26, 1936

About two years after passage of the Act of March 28, 1934, Congress amended Section 23 by adding the following paragraph:

> Where the adjustment of regular hours of duty of employees subject to the provisions of the preceding paragraph requires the adjustment of regular hours of duty of any employee whose compensation is fixed under the Classification Act of 1923, as amended, the aggregate *weekly earnings* of such employee whose compensation is fixed under the Classification Act of 1923, as amended, for full-time service shall not be less by reason of such adjustment than his aggregate *weekly earnings* for full-time service prior to March 28, 1934. Full-time service within the meaning of this paragraph shall not be less than forty hours per week. For the purposes of this paragraph, authority is hereby granted to adjust the *hourly rates of compensation* of employees whose compensation is fixed under the Classification Act of 1923, as amended, to such extent as may be necessary to make the aggregate *compensation for a forty-hour week* equal to the *compensation for a full-time week* prior to

March 28, 1934. [Italics supplied.] (Act of June 26, 1936, 49 Stat. 1969, 5 U. S. C. 673c).

This amendment evidences additional legislative recognition that "weekly earnings" and "hourly rates of compensation" are harmonious categories. And the legislative materials bearing upon the amendment clearly indicate that Congress assumed that the 1934 Act provided a 40-hour week for only such unclassified employees as were paid on an hourly or per diem basis.

The spokesmen for the Bureau of Engraving and Printing (the agency primarily responsible for the 1936 amendment) stated to the House Committee on the Civil Service that Section 23 of the 1934 Act provided a 40-hour week for employees engaged in mechanical trades (whose wages were fixed by a wage board and who were therefore not covered by the Classification Act of 1923); and that while such employees were working only 40 hours per week, other hourly employees covered by the Classification Act of 1923 were working 44 hours per week in accordance with applicable federal statutes. Accordingly, in order to authorize a 40-hour week for the latter group of employees, while maintaining their weekly compensation unimpaired, the 1936 amendment was enacted, granting authority "to adjust the hourly rates of compensation" of classified employees "to such extent as may be necessary to make the aggregate compensation for a forty-hour week equal to the

compensation for a full-time week prior to March 28, 1934."[16]

(2) *Overtime legislation enacted during the period of the war and national emergency*

The temporary overtime legislation enacted during the current period of war and national emergency has expressly been made applicable to employees whose wages are fixed on a monthly or annual basis by wage boards or other wage-fixing authorities. Plainly, therefore, such employees were not regarded by Congress as having been included within the overtime provisions of Section 23 of the 1934 Act; otherwise, the recent legislation would, to that extent, have been unnecessary.

[16] The House Committee explained the purpose of this amendment as follows (H. Rep. 2827, 74th Cong., 2d Sess., pp. 1–2):

"Section 23 of the [1934 Act] provided a 40-hour week for employees of the Bureau of Engraving and Printing engaged in mechanical trades. This affected 780 of the 4,203 employees, giving them a full week's pay for 40 working hours while the remainder, number 3,423, continued to be required to work 44 hours.

"This situation constitutes a very difficult administrative problem for the Bureau of Engraving and Printing, making it necessary to continue to operate on a 44-hour week basis and requiring that the working hours for members of the trades be staggered.

"The committee feels that in view of the granting of a 40-hour week to the employees engaged in the trades, and the further fact that Congress has extended the 40-hour week to postal employees and others, it is only fair to give the Secretary of the Treasury authority to extend it to the other employees of the Bureau of Engraving and Printing."

No such problem existed in the case of employees covered

The legislative history of the emergency overtime pay laws makes this overwhelmingly clear.

(1) *The Act of June 28, 1940*

Section 5 (a) of the Act of June 28, 1940 (54 Stat. 676, 678), which expired June 30, 1942, provided, *inter alia*, that:

> Notwithstanding the provisions of any other law, the regular working hours of the Navy Department and the Coast Guard and their field services shall be eight hours a day or forty hours per week during the period of the national emergency declared by the President on September 8, 1939, to exist: * * * *Provided further*, That compensation for employment in excess of forty hours in any administrative work-week computed at a rate not less than one and one-half times the regular rate *shall be paid only to monthly, per diem, hourly, and piece-work employees*, whose wages are set by the Act of July 16, 1862 (12 Stat. 587), as amended or modified; and also to professional and subprofessional employees and to [certain other employees] of the CAF service, as defined by the Classification Act of March 4, 1923 * * *: *Provided further*, That in determining the overtime compensation of per annum Government employees the pay for one day shall be con-

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by the Classification Act who were employed other than on an hourly basis because working hours of an establishment could be reduced where desirable in order to comply with Section 23 without reducing their compensation. See, e. g., 13 Comp. 277, 280.

> sidered to be one-three-hundred-and-sixtieth of their respective per annum salaries * * * [Italics supplied.]

In its report on the bill, H. R. 9822, the Senate Committee on Naval Affairs observed that this was the first instance of overtime compensation to monthly and annual employees (S. Rep. No. 1863, 76th Cong., 3d Sess., pp. 11–12):

> As to compensation, section 5 (a) * * * simply provides that with the establishment of a 40-hour workweek all employees in the Navy Department, the Coast Guard and their field services shall receive uniform treatment in the payment of compensation for employment in excess of 40 hours in any administrative work [sic] of 7 days. In this regard, the provision for the payment of compensation to per annum and per month employees is a departure from the practice heretofore followed. * * *

Similarly, the House Committee on Naval Affairs, in reporting the bill, stated (H. Rep. No. 2257, 76th Cong., 3d Sess., pp. 3–4):

> Overtime pay has heretofore not been allowed to any per annum employees of the Government, although overtime pay at time and one-half is allowed to per diem employees. * * *
>
> In order to calculate the amount of overtime pay for per annum employees it is necessary to specify in the act the corresponding daily pay. This has been done in accordance with long-standing Government

custom by fixing it at one three-hundred-and-sixtieth of the annual salary on the customary basis of 12 months to a year and 30 days to a month.

(iii) *The Act of October 21, 1940*

The Act of October 21, 1940 (54 Stat. 1205), which expired on June 30, 1942, provided overtime compensation, *inter alia*, for monthly employees whose wages are set by wage boards or other wage-fixing authorities:

> notwithstanding the provisions of any other law, compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate is hereby authorized to be paid at such places and *to such monthly*, per diem, hourly, and piecework *employees* of the field services of the War Department and *the field services of the Panama Canal whose wages are set by wage boards or other wage fixing authorities*, and also to professional and subprofessional employees and to [certain other employees] of the CAF service, as defined by the Classification Act of March 4, 1923 * * * *as shall be designated from time to time by* the Secretary of War or *the Governor of the Panama Canal*, as the case may be. * * *: *Provided*, That in determining the overtime compensation of the foregoing per annum Government employees the pay for one day shall be considered to be one three-hundred-and-six-

tieth of their respective per annum salaries. [Italics supplied.]

The proponents of this measure expressed their understanding that it would place annual and monthly employees on the same overtime basis as other employees.[37]

(iii) *The Act of June 3, 1941*

By the Act of June 3, 1941 (55 Stat. 241), which also expired on June 30, 1942, Congress au-

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[37] In the discussion in the Senate on the bill (S. 4208) which became the Act of October 21, 1940, Senator Danaher asked whether "its provisions would supplement the provisions of other legislation in which we undertook to deal with prevailing rates of labor, and generally dealing with construction items of that sort in the Canal Zone." Senator Thomas of Utah answered (86 Cong. Rec. 13421):

"* * * I think the answer to that question is, 'Yes,' although the word 'supplement' is hardly the right word. We have passed a measure providing for an 8-hour day and a 40-hour week for the ordinary workers in Government arsenals and those now doing defense work. Other workers are on an annual wage. In order to make the pay during this time consistent the Senate committee amendment is necessary."

In the House debates on S. 4208, Mr. Ramspeck of the House Committee on the Civil Service, pointed out that (86 Cong. Rec. 13557):

"The Secretary of War and the Assistant Secretary of War * * * say that they have the legal authority now to pay overtime to certain employees of the War Department in the arsenals and at the Panama Canal, but as to others they have not this authority and this creates a bad administrative situation. They have recommended this bill, which has passed the Senate, and it is my understanding we have given the same authority to the Navy Department as to the Navy yards."

thorized payment of overtime compensation to annual employees of the field services of the War Department, the Panama Canal, the Navy Department, and the Coast Guard engaged in the same overtime work as that upon which employees specified in Section 5 (a) of the Act of June 28, 1940, *supra*, p. 32, and in the Act of October 21, 1940, *supra*, p. 34, were engaged. Senator Reynolds, when introducing S. 1541, the bill which became the Act of June 3, 1941, quoted as follows from a letter of the War Department of May 19, 1941 (87 Cong. Rec. 4275–4276):

> The bill provides for overtime work in the Field Service of the War Department at the rate of time and one-half for per annum employees.
>
> The bill merely places them on the same basis that laborers and mechanics are now on.
>
> It also gives the War Department power to keep the Field Service employees at work during the time when they would otherwise be on vacation. * * * .

See H. Rep. No. 593, 77th Cong., 1st Sess., p. 1, to the same effect.

(iv) *Joint Resolution of December 22, 1942*

The Joint Resolution of December 22, 1942 (56 Stat. 1068), provided overtime pay for Government employees, but excluded from its scope those employees "whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards

or similar administrative authority serving the same purpose" (§1), thus recognizing that monthly and annual employees whose compensation was fixed by wage boards were within the class for which legislation authorizing overtime pay was necessary. The Senate report on this measure stated (S. Rep. No. 1847, on S. J. Res. 170, 77th Cong., 2d Sess., pp. 2–3):

> The joint resolution provides for the extension until April 30, 1943, of the laws authorizing the payment of overtime compensation to per annum employees in the War and Navy Departments, and for the extension of such authority to cover other employees of the Government. The joint resolution will not affect employees whose compensation is based upon hourly rates fixed and adjusted by wage boards or similar administrative, * * *.
>
> "The overtime compensation payable under the joint resolution would be computed at the rate of one and one-half times an employee's regular basic rate. For the purpose of such computation the basic rate for 1 day will be considered to be one three-hundred-and-sixtieth of so much of an employee's annual salary as does not exceed $2,900 per annum * * *.

(v) *War Overtime Pay Act of 1943*

Any doubt as to the understanding of Congress with respect to the scope of the overtime benefits of Section 23 of the 1934 Act is removed by the

War Overtime Pay Act of 1943,[18] § 1 of which provides:

> * * * That this Act shall apply to all civilian officers and employees (*including officers and employees whose wages are fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose*, except those in or under the Government Printing Office or the Tennessee Valley Authority) in or under the United States Government, including Government-owned or controlled corporations, * * * *except that this Act shall not apply to* * * * *employees whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose;* * * *. [Italics supplied.]

The Act of 1943 thus specifically distinguishes between the two classes of employees whose wages are fixed by wage boards or other wage-fixing authorities, namely, (1) monthly and annual employees, and (2) hourly and per diem employees. The Act provides for the payment of overtime to the monthly and annual class, but excludes hourly and per diem employees. The legislative history clearly shows that the exclusion was based on the

[18] Act of May 7, 1943, 57 Stat. 75; this statute "shall terminate on June 30, 1945, or such earlier date as the Congress by concurrent resolution may prescribe."

assumption of Congress that overtime pay had already been provided for hourly and per diem employees, but not for monthly and annual employees, by Section 23 of the 1934 Act. Thus, during the consideration of the bill (H. R. 1860) which became the 1943 Act, an amendment was offered in the Senate to extend the bill to employees already entitled to overtime compensation under Section 23 of the 1934 Act, and to preclude payment of overtime under Section 23. The Senate rejected the amendment (89 Cong. Rec. 3176, 3185). And in presenting the Conference Committee report on the bill, as subsequently enacted, Representative Ramspeck stated in the House that the purpose of the measure was "to give additional pay to a million and a half employees of the Government who are not covered by other pay legislation" (89 Cong. Rec. 3654).

Both the Joint Resolution of December 22, 1942, and the War Overtime Pay Act of 1943 fix overtime compensation for monthly and annual employees by computing the daily rate as $\frac{1}{360}$ of the employee's annual pay. This formula is substantially less advantageous to the employee than that provided for per diem and hourly employees under Section 23 of the 1934 Act. The resulting discrimination between monthly and annual employees under the 1943 Act and per diem and hourly employees under Section 23 of the 1934 Act was called to the attention of Congress, but

the method was nevertheless adopted despite efforts to amend the bill to provide overtime payments for all on the more liberal basis.[19] If the monthly and annual employees expressly included in the 1943 Act were already entitled to overtime pay under the more liberal provisions of Section 23 of the 1934 Act, as the court below held, it is not unreasonable to suppose that they would have been excluded from the 1943 Act together with the per diem and hourly employees who are admittedly entitled to overtime pay under Section 23.

It is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; cf. *United States* v. *Hutcheson*, 312 U. S. 219. For when Congress, acting over a period of years, passes a series of statutes dealing with the same subject matter, the acts are to be construed in their historic setting as segments of an integrated whole. As Chief Justice Taney said in *Brown* v. *Duchesne*, 19 How. 183, 194, "it is well settled that,

[19] See 89 Cong. Rec. 3128, 3176, and 3559, where the Senate rejected an amendment to H. R. 1860 to provide that, in computing overtime compensation of per annum employees, the base pay for one day should be considered as $\frac{1}{260}$ of the anual salary and the base pay for one hour should be $\frac{1}{8}$ of base pay so computed for one day.

in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law * * *." Compare the observation of Mr. Justice Reed in *United States* v. *Emory*, 314 U. S. 423, 434 (dissent): "A statute is not to be interpreted by its text alone, as though it were a specimen under laboratory control. It takes meaning from other enactments forming the whole body of law bearing upon its subject." See, also, *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391, and authorities there cited; *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21; *United States* v. *Barnes*, 222 U. S. 513, 520; *United States* v. *Sweet*, 245 U. S. 563, 572; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396; *United States* v. *Freeman*, 3 How. 556, 564. Viewed from this perspective, a statute derives meaning from later as well as earlier enactments. Many provisions of the overtime statutes enacted between 1936 and 1943 become virtually meaningless if Section 23 of the 1934 Act is to be construed as having already provided overtime compensation for monthly and annual employees whose salary was fixed by a wage board. We submit that the enactments of Congress dealing with overtime compensation for federal employees, considered in their entirety, reject the view that Section 23 of the 1934 Act was meant to apply to employees paid upon a monthly or annual basis.

(d) ADMINISTRATIVE PRACTICE.

(1) *Overtime Practice Prior to 1934 Act.*

The distinction between employees compensated on a monthly or annual basis, and those paid on a per diem or hourly basis, is firmly implanted in the federal employment system. Where the position is set up on an annual or monthly basis, the whole job to be performed is taken into consideration and the compensation fixed accordingly. The employee who fills such a position is usually retained even though the pressure of work varies and there may be an occasional slack in the work. As to such employees, minimum hours of employment were fixed at seven hours a day by the Act of March 3, 1883,[20] with power in the heads of departments to increase the hours of service above this minimum, but the Act specifically forbade the payment of additional compensation.[21] This statute embodied the traditional view that monthly and annual employees are deemed to be compensated for all the time necessary to fulfill the duties of their positions. See 2 Comp. Gen. 78; 2 *id.* 817.[22]

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[20] C. 128, 22 Stat. 531, 563; continued by the Act of March 15, 1898, c. 68, Sec. 7, 30 Stat. 316 (5 U. S. C. 29).

[21] The proviso against extra compensation in the Act of 1883 was superseded by Section 6 of the War Overtime Pay Act of 1943, the remainder of the statute still remaining effective. 22 Comp. Gen. 619.

[22] Specific statutory exceptions have been made for certain employees such as those in the postal service, railway mail clerk, customs inspectors, immigration officials, meat

In marked contrast has been the treatment of per diem and hourly employees. Here, compensation is proportionate to output; overtime has been considered payable and has usually been paid (see Mayers, *The Federal Service*, pp. 519–521), either pursuant to statutory mandate or by specific agreement. 11 Comp. Dec. 377; 15 *id.* 620; 25 *id.* 359; 7 Comp. Gen. 73; cf. *United States* v. *Martin*, 94 U. S. 400.[23] This has been true of all such employees, whether classified or otherwise.

Section 23 of the 1934 Act deals with the "weekly compensation * * * set by wage boards or other wage-fixing authorities." The agencies employing wage board procedure, primarily the Navy Department, the Government Printing Office, and the Bureau of Engraving and Printing, have always been accorded the utmost freedom, compatible with the public interest, for handling employment problems.[24] Such freedom

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inspectors, etc. See 19 U. S. C. 267; 7 U. S. C. 394; 8 U. S. C. 109a, 109b; 39 U. S. C. 832; 39 U. S. C., Supp. III, 835.

[23] Questions as to overtime compensation for per diem and hourly employees arose under the Eight Hour Laws. Act of August 1, 1892, c. 352, 27 Stat. 340; Act of March 3, 1913, c. 106, 37 Stat. 726 (40 U. S. C. 321, 326). See 22 Comp. Gen. 926. An 8-hour day for hourly or per diem employees "above the grade of laborer" was prescribed for the Canal Zone by Executive Order No. 1888, promulgated on February 2, 1914, Sec. 12 (R. 38).

[24] Section 5 of the Classification Act of 1923, Act of May 4, 1923, 42 Stat. 1488, exempts from its scope apprentices, helpers and journeymen "in a recognized trade or craft." This exemption was extended to the field service by the

arose from the need of these agencies, in pursuing their industrial functions, for authority to handle wages of the required artisans flexibly, in order to compete with private industry at prevailing rates for the same class of employees in the community. See *Closing Report of Wage and Personnel Survey,* House Doc. 771, 71st Cong., 3d Session, p. 308 *et seq.;* 13 Comp. Gen. 265, 267, 13 *id.* 486.

Although the maximum amount of discretion in fixing terms of employment has traditionally been possessed by the agencies which employ wage board procedures, the basic distinction between annual or monthly and hourly or daily workers has always been observed, despite wide variance in the type of wage board procedure employed. Where positions have been classified on an annual or monthly compensation basis, the holders of such positions have customarily received no overtime pay. On the other hand, hourly or per diem workers, the bulk of the "apprentices, helpers, and journeymen" employed, have been paid overtime at straight or premium rates. Thus, schedules of wages promulgated by the Navy Department in 1931, and in effect in June 1932, the base period of reference in the 1934 Act made provision for

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Act of May 28, 1928, 45 Stat. 776, and the Act of July 3, 1930, 46 Stat. 1003. See, also, Act of November 26, 1940, Title II, § 3 (d) (xi), 54 Stat. 1212. The statutory exemption phrase, members of "recognized trade or craft," is apparently the equivalent of the "several trades and occupations" referred to in Section 23.

overtime, Sunday and holiday pay [25] for per diem employees, but specified that employees paid on a per annum or per month basis were not entitled to such additional compensation. *Schedule of Wages for Civil Employees in the Field Service of the Navy Department and the Marine Corps* Revised to July 23, 1931, p. 60.

Similarly, both the Bureau of Engraving and Printing [26] and the Government Printing Office [27]

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[25] In connection with holiday pay, the Joint Resolution of January 6, 1885, 23 Stat. 516, 5 U. S. C. 86, refers to "* * * employees of the Navy Yard, the Government Printing Office, Bureau of Printing and Engraving, *and all other per diem* employees of the Government * * *." [Italics supplied.]

[26] See Appendix B, *infra*, pp. 61–62. The Bureau of Engraving and Printing employs its required mechanical employees under Treasury appropriation acts which grant funds for "* * * other personal services * * * including wages of rotary press plate printers at per diem rates and all other plate printers at piece rates * * *, not to exceed the rates usually paid for such work * * *". Treasury Appropriation Act of July 5, 1932, c. 430, 47 Stat. 580, 588; Treasury Appropriation Act of February 23, 1931, c. 277, 46 Stat. 1217, 1226; Treasury Appropriation Act of May 15, 1930, c. 289, 46 Stat. 335, 345. After reference to prevailing rates, the terms of compensation established are set forth in the civil service forms used for appointments.

[27] The Congressional Printer was granted power, by R. S. 3763 to employ pressmen, binders, and other employees "at such rates of wages as he may deem for the interest of the Government and just to the persons employed * * *". For many years prior to 1924, the Government Printing Office functioned under a series of specific statutes which established hourly rates for the various

observed and applied the accepted distinction between per annum and hourly employees as to the payment of overtime compensation. The Government Printing Office affords a particularly striking illustration of the basic nature of the distinction since it handled employment under the Act of June 7, 1924 (43 Stat. 658, 44 U. S. C. 40). Although this statute granted the Public Printer broad power to determine wages, including compensation for night and overtime work, at no time was overtime paid to monthly or annual employees under this or any other act. See 13 Comp. Gen. 265, 270.

The same situation existed with respect to the Panama Canal, the agency here involved. In the exercise of his power to fix the general conditions of employment in the Canal Zone under the Act of August 24, 1912, the President promulgated Executive Order No. 1888 on February 2, 1914, establishing overtime compensation at the rate of "time and one-half" for per diem and hourly workers (Sec. 12), but Section 11 of the Order forbade pay-

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classes of necessary employees, such as pressmen, binders, leather parers, etc. Act of February 16, 1877, c. 58, 19 Stat. 231; Act of March 3, 1891, c. 350, 26 Stat. 1084; Act of June 6, 1900, c. 791, § 1, 31 Stat. 643; Act of August 24, 1912, c. 355, 37 Stat. 482; Act of August 2, 1919, c. 30, 41 Stat. 272. In one such statute providing extra compensation for Sunday work, per annum employees were mentioned for the purpose of being excluded from the benefits of the act. Act of March 4, 1909, c. 299, § 1, 35 Stat. 1021, 1024.

ment of overtime compensation to employees paid on a monthly or annual basis. This prohibition was equally observed in regard to monthly and annual employees who were members of the A. F. of L. and whose wages were fixed by the advisory board established for that purpose by the President in 1919 (see p. 5, *supra*).[28]

The long-standing distinction in the field of overtime compensation, between monthly and annual employees, on the one hand, and per diem and hourly employees on the other, has an equitable as well as practical basis. The former group have a relatively greater security of tenure than the latter, who are usually laid off whenever the work slackens temporarily. Members of the monthly-annual category usually occupy the more important Government posts, with substantial responsibility and relatively higher rates of pay.[29] And as is well known in Government service, those holding executive or supervisory positions are expected to put in such additional hours of work—

[28] The Board's advisory jurisdiction was composed, in general, of cases relating to "hourly rates for all crafts, monthly rates derived from hourly rates, and monthly rates such as those for employees of floating equipment, in the transportation department of the Panama Railroad, or elsewhere," which are derived from rates paid for the same or similar services in the United States (R. 9).

[29] In all three of the positions held by respondent during the claim period—operator, chief operator, and master of a dredge—he was required to hold a license as "master, Pipe Line Suction Dredge," issued by the Board of Local Inspectors of the Panama Canal (R. 6, 7, 8).

on Sundays, holidays, or evenings—as may be necessary for the proper discharge of their functions, usually without additional compensation. Moreover, certain perquisites of office attach to the monthly-annual jobs which do not apply to the hourly-per diem jobs, e. g., more favorable leave provisions. Thus, monthly employees in the Canal Zone (including respondent) were accorded 24 days annual leave, 30 days additional "cumulative leave," and 7 days travel leave, a total of 61 days of leave annually (R. 43–45). This is to be compared with the total leave for per diem and hourly employees of 51 days (including 20 days cumulative leave) (R. 44).

(2) *Administrative practice after 1934 Act.*

The practice of not paying overtime compensation to annual or monthly employees continued uninterruptedly after passage of the 1934 Act. This administrative practice by the major agencies affected by the provisions of that Act is another factor supporting the construction of Section 23 for which we contend.[30] Relying upon rulings of the Comptroller General that Section 23 did not authorize payment of overtime to annual and

[30] As previously pointed out, the agencies who have exercised the power of determining conditions of employment and compensation by wage boards or similar procedures have always administered this power as being limited by the Act of March 3, 1883, *supra*, p. 42, and the Act of March 15, 1898, *supra*, p 42.

monthly employees,[31] the Navy Department, the Government Printing Office and the Bureau of Engraving and Printing have interpreted Section 23 as applicable only to per diem and hourly employees.[32] And the Canal Zone has likewise followed that interpretation consistently. Since

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[31] 13 Comp. Gen. 265, 270; 13 *id.* 280; 14 *id.* 156, 164. The Comptroller General interpreted Section 23 as applying to the hours of work of monthly and annual employees, but as not affecting their compensation, and hence as not authorizing overtime compensation for such employees. He accorded the same treatment to the 40-hour law obtained by postal employees shortly after the passage of Section 23. Act of August 14, 1935, 49 Stat. 650; 15 Comp. Gen. 175. This interpretation was specifically rejected by Congress. Act of May 7, 1936, 49 Stat. 1266. No such action was taken as to the Comptroller General's interpretation of the 1934 Act.

[32] This consistent administrative practice was partially brought to the attention of the court below by the Government on its first motion for a new trial, in the form of letters which disclosed that the administrative practice of the War and Navy Departments had always been to pay no overtime to ~~hourly~~ or monthly employees. The court discounted this evidence of administrative practice on the ground that the letters did not show that such employees had in fact been worked overtime subsequent to the passage of the 1934 Act. Additional inquiries were then directed by the Department of Justice to the Government Printing Office, the Bureau of Engraving and Printing, and the Navy Department. Letters elicited by these inquiries disclosed that monthly and annual employees had, in fact, been working in excess of forty hours per week subsequent to the passage of Section 23 and that no overtime had been paid. These letters were submitted to the Court of Claims by the Government on its second motion for a new trial, but the motion was overruled on the day it was made.

1934, the Panama Canal has employed on an annual average 1,450 American employees not within the Classification Act, who are compensated on a monthly or annual basis and have an average annual salary of $3,148. None of such employees was paid overtime until enactment of the Act of October 21, 1940 (54 Stat. 1205), which expressly authorized such payment to monthly employees. (See pages 7–8, 34, *supra*)[33]

This uniform administrative interpretation and practice under the 1934 Act, in effect for some 6 years before the present suit was brought, was open and well-known, and hence presumably was known to Congress.[34] Cf. *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *United*

[33] The letters showing the administrative practice are contained in Appendix C, *infra*, pp. 63–66. The War Department is excluded from the instant discussion of administrative practice in view of a ruling of the Comptroller General that the methods of employment utilized by it do not constitute the use of wage boards or similar procedure within the meaning of the statute. 13 Comp. Gen. 486; 14 *id.* 552; letter of April 8, 1944, from War Department to Mr. B. F. Burdick, Chief of Office, The Panama Canal, Washington, D. C., Appendix D, *infra*, pp. 67–68.

[34] The administrative construction of Section 23 of the 1934 Act as being inapplicable to marine employees of the Canal Zone, such as the respondent, was brought to the attention of Congress in connection with the Act of July 9, 1937 (50 Stat. 486), reaffirming the President's authority to fix conditions of employment for employees of the Panama Canal. The Comptroller General had ruled (14 Comp. Gen. 156, 158, 165) that Section 23 did not apply to marine employees of the Canal Zone, because their rates

States v. *G. Falk & Brother*, 264 U. S. 143, 150, 152. To construe the statute as urged by the Government brings it into harmony with prior law and the uninterrupted administrative action of more than 50 years. To construe it as did the Court of Claims is to impute to Congress an intent radically to change settled administrative practice and to effect a major classification change, by means of a statute ostensibly designed for the more limited purpose of restoring a certain group of employees to their status prior to the Economy Acts.

II

THE COURT OF CLAIMS EMPLOYED AN INCORRECT METHOD OF COMPUTING OVERTIME COMPENSATION

Assuming that Section 23 is applicable to the respondent, it is submitted that the method of computing overtime compensation used by the court below was incorrect.

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were based upon those of similar employees in the continental United States whose compensation was fixed pursuant to statute, and not by wage boards or other wage-fixing authorities. The court below evidently misunderstood the Comptroller General's ruling; its opinion erroneously states that the Governor, in disregard of this ruling, required the respondent to work 48 hours per week (R. 14–17).

During the consideration of the 1937 Act in Congress, the Governor of the Canal Zone and the Secretary of War, in letters addressed to the chairman of the Senate and House Committees considering the legislation (see Appendices E and F, *infra*, pp. 69–86) pointed out that Section 23 had been construed by the Comptroller General as "not applicable to American employees of the Canal generally," which obviously included the marine employees.

In order to determine the daily wage rate which should be used as the base for computing the "time and-one-half" rate for overtime, the court below multiplied respondent's monthly salary by 12, divided the result by 52 to obtain a weekly figure, and divided the weekly figure by 5 to ascertain the compensation for an 8-hour day. The method used was inconsistent with the only formula permitted by law for converting a monthly or annual salary to a per diem basis.

If the respondent was subject to Section 23 between 1934 and 1939, it was as an employee whose monthly compensation was fixed, in terms of fractional portions, by the Act of June 30, 1906 (c. 3914, § 6, 34 Stat. 763, 5 U. S. C. 84). That Act establishes "the following rules for division of time and computation of pay for services rendered" by monthly employees:[35]

> * * * in making payments for a fractional part of a month one-thirtieth * * * of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for

[35] In his brief below, the respondent endeavored to find a contradiction between this statute and the position taken by the Government as to the right to overtime. The Act of June 30, 1906, is not an overtime statute but is rather designed to provide a method of calculating fractions of compensation periods. The respondent's contention in fact supports the position taken in this brief, namely, that if Section 23 is applicable, the respondent's overtime compensation is governed by the 1906 Act, in the absence of any contrary direction in the 1934 Act.

> computing time for services rendered during a fractional part of a month in connection with * * * monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. * * *

If the above-defined method be applied to the respondent's monthly salary ($336) as master during the period December 1, 1937 to August 31, 1939, his allocable daily salary would be $11.20, and not $15.51, as computed by the court below, as a result of converting the respondent's salary to a per diem basis on a 260-day year (R. 14). The respondent would then be entitled to receive $5.60 additional pay for each of the 84 days' work in excess of 40 hours per week found by the court below to have been served by him as master, and not an additional $23.25 for each such day, as determined by the court below. Similar reductions would be required as to the other parts of the claim period.

The propriety of applying the terms of the 1906 Act to the respondent, if he comes within Section 23, can be illustrated by reference to the temporary war overtime legislation already discussed (pp. 32–41, *supra*). Each of these acts, in conferring overtime privileges, applies the formula of the 1906 Act to determining overtime pay for any

monthly employees. See Act of June 28, 1940, Sec. 5 (a) (*supra*, p. 32); Act of October 21, 1940 (*supra*, p. 34); Act of June 3, 1941 (*supra*, pp. 35–36); War Overtime Pay Act of 1943, Sec. 2 (*supra*, p. 38); Joint Resolution of Dec. 22, 1942 (*supra*, pp. 36–37). Congress has never authorized deviation from the 360-day basis set forth in the Act of June 30, 1906, *supra*, as the method for determining fractional compensation of monthly or annual employees. See page 17, *supra*.

We submit, therefore, that, even if Section 23 is held to be applicable to the respondent, the decision of the Court of Claims should be reversed in so far as the method of computing the respondent's overtime compensation is concerned, and this Court should direct that such computation be made to conform with the Act of June 30, 1906, *supra*.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
ENOCH E. ELLISON,
SAMUEL D. SLADE,
JULIAN R. WILHEIM,
Attorneys.

NOVEMBER 1944.

APPENDIX A

HEARINGS BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS, UNITED STATES SENATE (PP. 59–61), SEVENTY-THIRD CONGRESS, SECOND SESSION, ON H. R. 6663.

January 17, 1934.

STATEMENT SUBMITTED BY N. P. ALIFAS, PRESIDENT DISTRICT NO. 44, INTERNATIONAL ASSOCIATION OF MACHINISTS, AND REPRESENTING THE METAL TRADES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR

On behalf of the 75,000 or more per diem mechanics and workmen employed at the navy yards, arsenals, the Panama Canal Zone, and numerous other divisions of the Federal service, whose wages are set by wage boards or similar wage-fixing authorities, I desire to urge your committee to eliminate from the economy section of the independent offices appropriation bill now under consideration all items which reduce the pay of these employees; and to repeal all those sections of current economy legislation which reduces pay.

Among the items referred to, are the 15-percent congressional cut which expires on June 30, 1934; the prohibition against automatic and administrative promotions which seriously adversely affect our apprentices and employees who have been reemployed at the same trade at lower rates of pay; and furloughs.

In addition to the loss of the 15-percent congressional cut, the navy-yard employees in particular have had their hours reduced to an average of 40 per week, by making every alternate Monday a nonwork day without pay. This furlough has practically become the permanent policy of the Navy Department, and results in a permanent reduction of over 22 percent in the base pay of these employees.

During the life of the current economy legislation, thousands of mechanics and workmen who received the first-class rate of pay, were discharged due to lack of work and lack of funds, and upon being reemployed, were accorded only the second- or third-class rate. In many trades approximately one third of the men were returned to work at the third-class rate, which in the case of a mechanic whose base rate is 88 cents per hour, results for that class of workmen in a total reduction in pay of 30.9 percent, while other divisions of the Federal service were suffering only a reduction of 15 percent.

During the last session of the Seventy-second Congress, President Hoover recommended the reconvening of wage boards with the understanding that mechanics and other workmen coming under them should be reduced 30 per cent. Congress declined, and very properly, to cut these employees to any greater extent than the cut imposed on other employees.

During the last session of the present Congress this group of employees was again saved by Congress from a more serious cut than others sustained; and they were limited to 15 percent, the same as others.

Notwithstanding this determined attitude upon the part of Congress to place all Government employees, officers, and officials upon an equality as to pay cuts, administrative measures have since then been taken to impose an additional 7-percent cut on all navy-yard employees by cutting the hours without a corresponding increase in pay, and an additional 15.9 percent cut to a very large proportion of them, by reemploying them at lower rates of pay.

In addition to these more or less permanent reductions in pay for per diem employees, thousands of them have been furloughed without pay for protracted periods; and in some instances they have been furloughed for one third of the time for an entire year, involving a reduction in pay of 43 percent.

In the navy-yard service a splendid 4-year apprenticeship system exists. Each apprentice is required to pass an examination annually for the purpose of disclosing his increased knowledge of the trade and his progress in the apprenticeship school. If he passes the examination, he is advanced to a higher grade, and his pay is increased. The economy law, prohibiting promotions, has barred these apprentices from just compensation as workmen. This should be restored to them.

In like manner, under our efficiency system, employees are presumed to be promoted to higher rates of pay in accordance with their improved efficiency. This, too, has been eliminated by the prohibition against administrative promotions.

In the event your committee decides to eliminate the entire 15-percent pay cut, it is respectfully suggested that language be inserted in lieu of what

is now carried in the bill which will protect these employees against wage cuts by wage boards which, it is presumed, will be immediately convened in the event Congress eliminates the pay cut.

The following language we believe would serve this purpose:

> *Provided*, That the rates of compensation for the several trades and occupations, which are set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than the respective wage schedules in effect on June 1, 1932; and that the Navy Department and other departments and independent establishments of the Government are hereby directed to restore to employees any reduction in pay which they have received since June 30, 1932, in addition to the 15 percent Congressional cut, without increasing the present hours of service; and that the respective departments and independent offices are hereby authorized to incur such deficiencies as may be necessary to put this provision into effect.

It will be noted that the proposed amendment above quoted, establishes the present basic-wage schedules as the minimum, making it possible for wage boards to grant increases beyond this point. This feature does not give these employees any special advantage above what they have had heretofore. We feel that the administrative officials of the departments, in conformity with their past practices, will not be more generous than the law required. While in some divisions of the service, administrative officials grant increases to the limit of their authority, this does not appear to be true

in our division of the service, which we maintain requires protection only against unfair and administrative reductions in pay.

In view of the prospective increase in the cost of living, and in conformity with the policy of our Government under the N. R. A., to reduce hours and increase purchasing power, we respectfully submit that the request here made is exceedingly moderate. The fear we entertain that wage boards, if convened, will cut wages is by no means based upon the belief that such reduction in pay would be justified; but such economies we fear are likely to be effected as means by which departments may balance their budget, by subjecting these mechanics and laborers to sustain the burden of such economies.

In a general way, it might be said that all wages and salaries of Government employees and officials were originally based upon the approximate pay which such individuals would receive in private life. Unfortunately, the wage boards under the law would be compelled to put any reduction in the prevailing rate into effect for the per diem employees; while at the same time, it might be found that a similar reduction in pay in private industry would be shown for other salaried officers and employees, if they were subjected to a wage survey. In view of the fact that Congress has decided that other officials, officers, and employees should be treated alike in the matter of wage cuts and, we hope, in the matter of wage restoration, there is no good reason why a special group of employees, the per diem employees in this instance, should be subjected to any greater

cut or any greater limitation in restoration of their pay than other officials, officers, and employees of the Government.

We trust that your committee will keep the interests of these highly skilled mechanics and workers in mind, in reaching your decision regarding the economy features of the bill.

APPENDIX B

TREASURY DEPARTMENT
BUREAU OF ENGRAVING AND PRINTING
Washington 25, D. C.

NOVEMBER 3, 1944.

MY DEAR MR. SHEA:

This letter is in response to your telephone request of yesterday for a statement showing the method of computing the compensation of employees paid on a monthly or annual basis during the years 1931 and 1932, and whose compensation was fixed by a wage-fixing authority.

During the years of 1931 and 1932, this bureau had a number of employees in its service whose compensation was fixed by a wage-fixing authority, and who were paid on a monthly or annual basis. All of these employees were required to work more than forty hours a week as the bureau, during these years, was operating five and one-half days, or forty-four hours a week. Some of these employees, on occasions, were required to work more than eight hours in one day. In no instance, however, were any of these employees on a per annum basis paid for overtime. The per diem employees, during these two years, were paid time-and-a-half for time worked in excess of eight hours a day.

The announcements of the United States Civil Service Commission of examinations for positions paid on a monthly or annual basis, and the letters of appointment, stated the annual salaries with

no reference to pay for overtime. In the case of per diem positions, the regular rates and the overtime rates were stated.

Very truly yours,

A. W. HALL,
Director.

Honorable FRANCIS M. SHEA
Assistant Attorney General
Washington 25, D. C.

APPENDIX C

Address Reply To
The Secretary of the Navy
and refer to initials
and no.
PS&M–1a–McP:bjs

NAVY DEPARTMENT,
Washington, 4 November 1943.

MR. WILLIAM M. WHITMAN,
% Chief of Office, Panama Canal,
411 Tenth Street NW., Washington, D. C.

DEAR SIR: Reference is made to your recent telephone call requesting information as to whether overtime has been paid under the provisions in Section 23 of the Independent Offices Appropriation Act of 1935, passed March 28, 1934 to civil employees of the Navy Department who are paid on a per annum basis and who are not within the purview of the Classification Act of 1923 as amended.

These employees, which numbered approximately 6,000, have not been paid overtime under the above cited statute. A large number of these employees have been transferred from a per annum to a per diem basis. Those continued on a per annum basis are now paid overtime under the following provision in Section 1 of the "War Overtime Pay Act of 1943" approved May 8, 1943:

> * * * That this Act shall apply to all civilian officers and employees (including officers and employees whose wages are

fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose * * *) * * *.

Very sincerely,

[S] CHARLES PIOZET,
Charles Piozet,
Director of Civilian Personnel.

UNITED STATES GOVERNMENT
PRINTING OFFICE,
Washington 25, D. C., March 22, 1944.

The ATTORNEY GENERAL,
Department of Justice,
Washington 25, D. C.

DEAR SIR: There has been received your letter dated March 20, 1944, (File—FMS:JRW C. Cls. #45097) in which desire is expressed for this office to furnish information in reply to questions stated.

The questions are answered in the order presented as follows:

(1) The Government Printing Office has employees hired and paid on an annual basis whose compensation is fixed by wage boards or other wage fixing authorities since March 28, 1934.

(2) Such employees have been directed to work and have worked in excess of 40 hours per week since the effective date of the statute.

(3) Such employees have not been paid overtime compensation for work in excess of 40 hours per week pursuant of the provisions of the statute that "All overtime should be compensated for at the rate of not less than time and one-half." The

reason for such action is contained in a decision of the Comptroller General of the United States (13 CG 265) which states in part, that employees paid on an annual basis who may be required to work more than 40 hours per week are not entitled to overtime.

Very truly yours,

A. E. GIEGENGACK,
Public Printer.

By (Signed) F. E. CHRISTOFANE,
Comptroller.

TREASURY DEPARTMENT,
BUREAU OF ENGRAVING AND PRINTING,
Washington 25, D. C., March 22, 1944.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Washington 25, D. C.

MY DEAR MR. SHEA: Receipt is acknowledged of your letter of March 20, 1944, regarding the matter of overtime pay for work in excess of 40 hours per week with respect to employees paid on a monthly or annual basis whose compensation is fixed by wage boards or other wage-fixing authorities.

In reply to the questions contained in your letter, you are advised that this bureau had on March 28, 1934, and until August 1, 1942, a number of employees in the service whose compensation was fixed by a wage-fixing authority and who were paid on an annual basis. Some of these employees were, on occasion, required to work more than 40 hours per week. However, in no instance

were any of these per annum employees paid time-and-a-half for such overtime.

Very truly yours,

(Signed) A. W. HALL,
Director.

NAVY DEPARTMENT,
Washington, D. C., April 4, 1944.

CHIEF OF OFFICE,
Panama Canal, Washington, D. C.

DEAR SIR: Reference is made to your letter of March 21, 1944, requesting that you be advised whether or not civilian employees of the Navy Department whose wages are fixed by "wage boards or other wage-fixing authorities" on a monthly or per annum basis have been required to work in excess of forty hours per week after the date of the enactment of Section 23 of the Independent Offices Appropriation Act of 1935 (March 28, 1934), and if so, whether any overtime compensation has been paid to such employees under the provisions of that section.

The civilian employees of the Navy Department referred to above have been required to work in excess of forty hours per week after the date of the enactment of the cited statute and no overtime compensation has been paid to such employees under the provisions of that statute.

Very sincerely,

RALPH A. BARD.

APPENDIX D

WAR DEPARTMENT
Washington, April 8, 1944.

MR. B. F. BURDICK,
Chief of Office, The Panama Canal,
Washington 25, D. C.

DEAR MR. BURDICK: This is in reply to your letter of March 21, 1944, in which you request additional information regarding the payment of overtime compensation to monthly and per annum employees under the Act of March 29, 1934.

In view of the fact that your office has indicated a desire for an early reply in this matter, it has not been possible to gather complete and adequate information from the operating elements of the War Department. It can be stated, however, that this Department has never adopted the practice of paying overtime compensation under the 1934 law to any employees other than those paid on a daily or hourly basis. It is also true that employees paid on a per annum or monthly basis whose rates of compensation were not fixed in accordance with the Classification Act of 1923, as amended, have been required to work in excess of 40 hours per week. In the period immediately preceding the entry of the United States into the present war, it was a general practice to require ungraded employees, not covered by the Act of March 28, 1934, to work five and one-half days per week or a total of 44 hours per week. Effective January 9, 1942, the Department adopted a

48 hour week and ungraded employees paid on a per annum basis have, since that date, worked six eight-hour days.

In this connection, however, it is felt that a consideration is involved which was not brought out in the decision of the Court of Claims to which you refer. Although this Department was, of course, influenced by the decision of the Comptroller General, holding that per annum employees were not entitled to overtime under the law in question, the further matter of wage board procedure was also involved. In a number of instances, the Comptroller held that the wage fixing procedure followed by the Air Corps, the Engineer Department, and other elements of this Department did not meet the statutory requirement of "wage boards or other wage-fixing authorities" (see Comp. Gen. 486; 14 *id.* 552). In view of the above, it would appear that the War Department is in a different position from your organization with respect to the decision in the *Townsley* case, inasmuch as the wage fixing practice has been held not to meet the statutory requirement. It was not until the early part of 1943 that a general and formal wage board procedure was adopted for ungraded employees as a whole.

If the Department can be of further assistance to you in securing more detailed and specific data from the Forces and Technical Services, please be assured of our complete willingness to do so.

Sincerely yours,

(Signed) JOHN W. MARTYN,
Administrative Assistant.

APPENDIX E

BALBOA HEIGHTS, C. Z.,
May 8, 1935.

The Honorable SCHUYLER OTIS BLAND,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D. C.

DEAR MR. BLAND: I have received your letter of April 22d concerning Panama Canal legislation and I appreciate greatly the prompt consideration which your Committee is giving these matters.

As concerns H. R. 6719 to amend the Canal Zone Code, which was introduced by you and which you state has recently been reported favorably, I have just learned that effort will probably be made by the Washington legislative representatives of local organized labor groups to secure an amendment to section 2 of the bill which would have the effect of incorporating into the Canal Zone Code the 40-hour week provision of the so-called Thomas Amendment to the Independent Offices Appropriation bill for 1935 (48 Stat. 522).

The purpose of section 2 of H. R. 6719 is to confirm the general authority which has always been exercised by the President in the matter of fixing the salaries and conditions of employment of the personnel of the Canal organization within the limits prescribed by Congress. The proposed legislation was made necessary by a recent ruling of the Comptroller General denying the power of the President, in the absence of specific statutory

authority, to establish rules governing the commutation of leave of certain employees. The proposed section is designed to cover specifically all those matters relating to conditions of employment with respect to which it may fairly be assumed that the Comptroller General might rule similarly.

It is my opinion that it would be entirely inconsistent in confirming the general authority of the President for fixing the conditions of employment of Canal personnel to impose such a restrictive provision as that embodied in the Thomas Amendment. Particularly does this seem to be true when it is considered that the Thomas Amendment is general legislation of the United States which is not applicable to American employees of the Canal generally and affects only a certain number of employees in particular groups solely by reason of a ruling to that effect by the Comptroller General. Furthermore, it freezes the salaries as well as the hours of work of the particular employees to which it applies, which is of course inconsistent with the general purpose of the proposed legislation.

It should be noted that the enactment of section 2 of H. R. 6719 will not revoke the provisons of the Thomas Amendment. It will, however, leave it within the discretion of the President to determine the working hours of all employees of The Panama Canal; and the President might, if he so desired, establish a 40-, 44-, or 48-hour week for all employees of The Panama Canal if he considers it advisable to do so. In the absence of affirmative action by the President, however, no changes in working hours would be made. It is important that the hours of work among the several classes

of Americans on the Canal Zone be coordinated and that of course can best be done here where all conditions are known, but it is more important that general legislation for the United States be applied only with great care to the Panama Canal because of the many special conditions of employment here. For instance, the limitation of 40-hours of work per week has been extended to men here who already had very generous annual vacation allowances necessary in this climate to permit trips to a temperate climate for recuperation, with the result that our 40-hour men work only about 1717 hours per year on the average as compared to 1857 hours for Government men enjoying the 40-hour week in the United States.

The foregoing is submitted in order that you may be informed as to the views of the Canal administration if an amendment along the lines suggested is offered.

Very sincerely yours,

J. L. SCHLEY,
Governor.

THE PANAMA CANAL,
WASHINGTON OFFICE,
Washington, June 11, 1935.

Honorable THOMAS P. GORE,
Chairman, Committee on Interoceanic Canals,
United States Senate, Washington, D. C.

MY DEAR SENATOR GORE: Governor Schley has informed this office by radio that he has learned that effort may be made to secure an amendment to Section 2 of bill H. R. 6719 "To amend the Canal Zone Code", which would have the effect of

incorporating into the Canal Zone Code the 40-hour week provision of the so-called Thomas amendment to the Independent Offices Appropriation Act for 1935 (48 Stat. 522).

The Governor is very much opposed to any such amendment to the bill as it passed the House for the reason, as he states, such an amendment would place a wholly inconsistent restriction on the general power of the President to fix the conditions of employment for all employees of The Panama Canal by granting entirely unjustified treatment to a certain group of employees which would be highly discriminatory.

The following explanation of the purpose of Section 2 of H. R. 6719, and the reasons why it is considered undesirable to permit the making of any amendment thereto, are stated in a letter which the Governor sent to Congressman Bland, Chairman of the Committee on Merchant Marine and Fisheries of the House, as follows:

> The purpose of section 2 of H. R. 6719 is to confirm the general authority which has always been exercised by the President in the matter of fixing the salaries and conditions of employment of the personnel of the Canal organization within the limits prescribed by Congress. The proposed legislation was made necessary by a recent ruling of the Comptroller General denying the power of the President, in the absence of specific statutory authority, to establish rules governing the commutation of leave of certain employees. The proposed section is designed to cover specifically all those matters relating to conditions of employment with respect to which it may fairly be

assumed that the Comptroller General might rule similarly.

It is my opinion that it would be entirely inconsistent in confirming the general authority of the President for fixing the conditions of employment of Canal personnel to impose such a restrictive provision as that embodied in the Thomas Amendment. Particularly does this seem to be true when it is considered that the Thomas Amendment is general legislation of the United States which is not applicable to American employees of the Canal generally and affects only a certain number of employees in particular groups solely by reason of a ruling to that effect by the Comptroller General. Furthermore, it freezes the salaries as well as the hours of work of the particular employees to which it applies, which is of course inconsistent with the general purpose of the proposed legislation.

It should be noted that the enactment of section 2 of H. R. 6719 will not revoke the provisions of the Thomas Amendment. It will, however, leave it within the discretion of the President to determine the working hours of all employees of The Panama Canal; and the President might, if he so desired, establish a 40-, 44-, or 48-hour week for all employees of The Panama Canal if he considers it advisable to do so. In the absence of affirmative action by the President, however, no changes in working hours would be made. It is important that the hours of work among the several classes of Americans on the Canal Zone be coordinated and that of course can best be done here where all conditions are known, but it is more important that general legislation for the United States be applied only

with great care to the Panama Canal because of the many special conditions of employment here. For instance, the limitation to 40-hours of work per week has been extended to men here who already had very generous annual vacation allowances necessary in this climate to permit trips to a temperate climate for recuperation, with the result that our 40-hour men work only about 1717 hours per year on the average as compared to 1857 hours for Government men enjoying the 40-hour week in the United States.

It is very desirable to have this bill passed before July 1st, which is the date beyond which the Comptroller General has stated he is not willing to permit the making of commuted leave payments without additional legislative authority.

In his radio of this date the Governor requested this office "to endeavor to persuade Senator Gore to secure most expeditious consideration of bill."

Early action on this bill is very much desired. There are no controversial matters contained in the bill and its purposes are fully explained in House Report No. 744.

Very respectfully,

A. L. FLINT,
Chief of Office.

THE PANAMA CANAL,
WASHINGTON OFFICE,
Washington, July 1, 1935.

Honorable THOMAS P. GORE, *Chairman,*
Committee on Interoceanic Canals,
United States Senate,
Washington, D. C.

MY DEAR SENATOR GORE: Following the telephone conversation between Miss Flint of your office and Mr. Smith of this office in regard to bill H. R. 6719 "To amend the Canal Zone Code," which has passed the House and is now before your Committee, a radiogram was sent to the Governor of The Panama Canal last Saturday, submitting to him the proposition of redrafting Section 2, so as to specify in the law the conditions of employment, etc., of Canal personnel in order to eliminate the objections growing out of the proposed grant of power in this regard to the President.

The Governor has replied in the following radiogram addressed to you:

> It seems quite impracticable and entirely undesirable to endeavor to redraft Section 2 of H. R. 6719 so as to specify general conditions of employment for Canal personnel. Because of different classes of personnel, including large element of tropical labor, and many other factors arising from local conditions, these conditions of employment as embodied in Executive Order Number 1888 of February 2, 1914, as amended, are necessarily voluminous and are almost altogether of a purely administrative nature which are not adaptable to enunciation in statutory form. May I state that Sec-

tion 2 does not grant any additional administrative powers as the President since the Spooner Act of 1902 has exercised complete authority with respect to conditions of employment here and although this authority has been exercised more than 30 years it was only recently that Comptroller General questioned authority respecting commutation of leave and merit of this decision seems highly debatable in view of decision of Supreme Court in McConaughey versus Morrow.

May I also point out that the legislative policy is well established of granting reasonably broad powers to the President in administrative matters relating to the Panama Canal. Particular reference is made to Sections 4, 5, 7, 8, 9, 51, 61, 81, 141, 153, 272, 321, 371, 401 of Title 2, Canal Zone Code, whereby Congress has delegated to the President or to the Governor wide authority with respect to administrative matters concerning which it was deemed inexpedient for Congress to legislate in detail, particularly in view of quickly changing local conditions. Most of these provisions have been in effect for many years and I am satisfied that long experience has shown that this general policy should be continued.

Section 3 of the bill merely includes in the local law a proviso which appears in the general retirement law of the United States which for some unexplainable reason was omitted when the local law was drafted. I consider it entirely reasonable on ground that employees serving here in tropics should not be in less favorable position as to disability retirement than those in United States.

Sections 4 to 7 accomplish only one change and that to permit refund of retirement deductions be made direct to named beneficiary rather than to estate of deceased employee thus simplifying matters for all concerned. Absolutely no additional expenditures are involved and the provisions are identical in substance and form with similar amendments to general retirement law by Act of June 22, 1934.

Particular care was exercised in drafting this bill to avoid the inclusion of matters which might possibly create legislative controversy and to confine the proposed amendments to those which experience had demonstrated to be necessary to correct minor defects which had been discovered in Canal Zone Code and to bring special legislation for Canal Zone into harmony with recent amendatory enactments applicable to United States generally.

I sincerely hope you may find it possible to report bill without substantial change.

The decision of the Supreme Court to which reference is made, *McConaughey* v. *Morrow,* is found in United States Reports, Volume 263, page 39. As Mr. Smith has advised you, the Comptroller General, in holding in his decisions of December 8, 1934, and February 12, 1935, that the making of commuted leave payments is not authorized, stated that he would make no objection to permitting these payments to continue until July 1, 1935. The Comptroller General's decision of February 12, 1935, closes with the following statement:

In view of the extended period over which the erroneous administrative practice has

prevailed no objection will be raised in the audit of the accounts to payments made prior to July 1, 1935 under such procedure and in connection with separations hereafter occurring or that occurred since date of decision, December 8, 1934, where it is shown that it was impossible to grant the accrued leave prior to the separation date in the particular case.

It is for this reason especially that it has been considered essential to urge the enactment of this legislation at the earliest practicable date.

Very respectfully,

A. L. FLINT,
Chief of Office.

THE PANAMA CANAL,
WASHINGTON OFFICE,
Washington, April 14, 1936.

Honorable F. RYAN DUFFY,
United States Senate,
Washington, D. C.

MY DEAR SENATOR DUFFY: The Governor of The Panama Canal has just radioed the following message to this office for transmission to you:

I greatly appreciate your having reported H. R. 6719 and H. J. Res. 412. I consider the provisions of these bills of sufficient importance in administration of Panama Canal affairs to warrant a personal appeal to you to endeavor to secure favorable consideration during short time remaining in present session.

The fourteen sections of H. R. 6719, which passed House June 3rd, 1935, provide relatively minor changes in Canal Zone

Code which was enacted in 1934. Most important provision is that which confirms authority exercised by President since 1904 to make regulations establishing conditions of employment for Panama Canal personnel. Comptroller General held in one typical case that such authority must be specifically delegated by Congress, and that a certain regulation was invalid in absence of such delegation of authority. Although Attorney General in recent review of situation confirmed Canal Administration's view that said regulation was within scope of President's authority, Comptroller General adhered to his original ruling, and the enactment of H. R. 6719 is therefore necessary. The legislation will have effect merely of ratifying regulations heretofore prescribed by President and which have been in effect since 1914 and no new privileges are granted thereby and no additional expenditures incurred.

Sections 3 to 7 of the bill will have effect of incorporating in laws relating to retirement of Canal employees on Isthmus certain provisions of general laws relating to retirement of Government employees in United States. These amendments are proposed because local retirement law was patterned on law in effect in the United States as to its general provisions and it is felt that employees serving here in tropics for long periods should not be in a less favorable position as to retirement than employees in Government service in United States. Sections 4 to 7 are identical in form and substance with similar amendments recently made in general law, and merely provide administrative changes involving no expenditure of funds whatever. Section 3 re-

stores to local law a proviso which appears in general law but which for some unexplainable reason was omitted when local law was drafted.

I think there is no controversy whatever as to other provisions of bill and I wish to assure you that particular care was exercised in drafting bill to avoid the inclusion therein of matter which might create legislative controversy and to limit the amendments to those which experience has demonstrated to be necessary at this time.

Having in mind the splendid assistance given by you in behalf of tolls bill and the time and effort devoted by you to that measure I greatly dislike disturbing you with this relatively inconsequential matter but enactment of this bill will be of such material assistance to Panama Canal administratively that I feel justified in soliciting your further assistance. House Report 744 contains rather full explanation of various provisions of Bill. The Washington office can furnish any further information which may be required.

As stated in the Governor's message, this office will be glad to furnish any additional information concerning these bills which may be required.

Very respectfully,

A. L. FLINT,
Chief of Office.

THE PANAMA CANAL,
WASHINGTON OFFICE,
Washington, April 16, 1936.

Honorable F. RYAN DUFFY,
United States Senate,
Washington, D. C.

MY DEAR SENATOR DUFFY: Supplementing the radiogram of April 13, 1936, from the Governor of The Panama Canal, relative to H. R. 6719, to amend the Canal Zone Code, quoted in my letter to you under date of April 14, 1936, there is quoted below another radiogram from the Governor, dated April 15, 1936, on this subject, which the Governor has requested be transmitted to you:

> Delegation from Panama Metal Trades Council called on me yesterday and requested assurance that Section 2 of H. R. 6719 if enacted would not be interpreted by me as having adverse effect on continuance of 40-hour week for mechanical trades which was brought about by application of so-called Thomas Amendment, Section 23 of Independent Offices Act of 1935, to some 900 out of about 3,000 American employees of Canal.
>
> Delegation was informed that I could not at this time commit Canal Administration concerning administrative questions which might arise if Bland Bill were enacted but that the long record of successive Canal administrations for fair dealing in employee relations should make it unnecessary for Governor to state specifically what action would be taken in particular contingencies which might arise in future. General policy has been and will continue to be to take generous view with reference

to justifiable special employment privileges as necessary compensation for special conditions arising out of service in tropics with Panama Canal. Fixed policy also is to keep abreast of policies of national administration in all matters relating to improved employment conditions for Government workers.

Meeting of Metal Trades Council last night decided to send Wahl as legislative representative to Washington to secure amendment to H. R. 6719 which would have effect of incorporating Thomas Amendment in Canal Zone Code. If desired amendment cannot be secured it is intimated that efforts will be made by Metal Trades to defeat consideration of bill in present session.

Section 2 of the bill was drafted at my direction after the Comptroller General had held that accumulated leave of Canal employees might not be commuted into cash after June 30th, 1935 and unusual efforts were made by me to secure the enactment of this provision prior to July 1st, 1935 so that no employees whose services were terminated might be deprived of privilege of having his leave commuted into cash. The section was drafted in broad terms so that there would remain no doubt of the validity of other regulations of the President granting important privileges to Canal employees because of service in tropics.

I should consider it most unfortunate if the application of the Thomas Amendment to a selected group of Canal employees should be incorporated in the bill as an amendment to section of Canal Zone Code which is designed to apply to all employees. The authority with which H. R. 6719 vests

the President is precisely the authority which has continuously been exercised by him since 1903 and it would be wholly inconsistent to restrict the exercise of this authority as to a special group of employees.

I desire to emphasize that Section 2 of H. R. 6719 will not revoke the provisions of the Thomas Amendment, which is a general law not specifically made applicable to the Canal Zone. Thomas Amendment, regardless of regulations which may be made by President for Canal Zone, will remain in effect in United States and establish conditions of employment for certain Government workers there which will be reflected in conditions of employment prescribed for similar employees of Panama Canal.

Very truly yours,

A. L. FLINT,
Chief of Office.

APPENDIX F

WAR DEPARTMENT,
Washington, March 31, 1937.

The SPEAKER, THE HOUSE OF REPRESENTATIVES,
Washington, D. C.

DEAR MR. SPEAKER: There is transmitted herewith draft of bill to amend the Canal Zone Code. The purposes of and the need for the enactment of the proposed legislation have been stated by the Governor of The Panama Canal as follows:

> The proposed bill contains three sections which provide changes in or additions to the Canal Zone Code. This legislation is proposed in the form of amendments to the Canal Zone Code for the reason that the several provisions are of local application only. A review of the several sections follows:
>
> * * * *Section 3.* Section 3 of the bill prescribes an amendment to section 81 of Title 2 of the Canal Zone Code relating to the appointment, removal and compensation of persons necessary for the operation and maintenance of the Canal. The section as amended will make no change in existing law except to add to the last paragraph a provision confirming the authority which from the beginning of the construction of the Panama Canal has been exercised by the President with respect to the establishment of conditions of employment for employees of the Canal organization. While the Attorney General of the United States has specifically held that the President is already vested with authority to establish

conditions of employment for the Canal service the Comptroller General, in a decision concerning the legality of regulations prescribed by the President relating to the commutation of leave for employees of the Canal organization, has held the exercise of such authority to be invalid without specific statutory authority.

The proposed section is similar to section 2 of H. R. 6719 introduced by Mr. Bland in the House on March 14, 1935. It will be recalled that H. R. 6719 contained some fourteen amendments to the Canal Zone Code and was finally enacted on June 24, 1936. Section 2 of the bill was objected to in the Senate, after having been adopted by the House, and in the subsequent conference between the House and the Senate the section was eliminated.

As stated in Report No. 744, 74th Congress, 1st Session, the purpose of the amendment provided by this section is not to vest powers which he has exercised continuously with respect to the conditions of employment for Canal personnel under the original authority contained in the Panama Canal Act of August 24, 1912, and heretofore considered confirmed in the decision of the United States Supreme Court in the case of *McConaughey* vs. *Morrow*, 263 U. S. 39, but questioned by the Comptroller General in his decisions dated December 8, 1934, and February 12, 1935 (A–57620), applying to the payment of commutation of leave for employees.

The objection was made when this amendment was previously considered that the specific grant of authority to the President to prescribe regulations concerning office hours and hours of labor might be inter-

preted as permitting the President by Executive Order to annul the application of the provisions of the Thomas Amendment prescribing a 40-hour work week for certain Canal employees. In order to remove any doubt as to the effect the proposed amendment would have upon the application of the provisions of the Thomas Amendment there has been added at the end of the section the following:

"And provided further, That nothing contained in this section shall affect the application to employees of The Panama Canal of the provisions of Section 23 of the Independent Offices Appropriation Act, 1935, 48 Stat. 522."

It is understood that all objections which previously have been made to the enactment of this section have been withdrawn and that no further objections will be offered.

The draft of bill attached was prepared under the direction of the Governor of The Panama Canal after extensive studies had been made of the subject matter and it is recommended that this legislation be given favorable consideration.

You are advised that the proposed legislation is in accord with the program of the President.

Very respectfully,

Secretary of War.

(In duplicate.)

Enclosure: Draft of bill.

U. S. GOVERNMENT PRINTING OFFICE: 1944